Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-604

UNITED CONTRACTORS INCORPORATED,
JMCO TRUCKING INCORPORATED,
JOINT EMPLOYERS, *Petitioners*

vs.

NATIONAL LABOR RELATIONS
BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Joseph W. Weigel
Law Firm of Joseph W. Weigel
700 North Water Street
Milwaukee, Wisconsin 53202
Telephone: 414-272-1158
Attorneys for Petititoners

Mr. Elliot Moore
Deputy Associate General Counsel
National Labor Relations Board
Office of the General Counsel
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Attorney for Respondent

Mr. Robert Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Joseph A. Szabo
Counsel for the General Counsel
National Labor Relations Board
744 North Fourth Street
Milwaukee, Wisconsin 53203
Attorney for Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

United Contractors, Incorporated and JMCO Trucking, Incorporated, the petitioners herein, pray that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the Seventh Circuit entered in the above entitled matter on June 23, 1976 and July 23, 1976.

OPINIONS BELOW

The opinion of the Administrative Law Judge John F. Corbley issued on May 30, 1975, is reported

in 220 N.L.R.B. 88; and a photo copy is annexed hereto in Exhibit A, infra, pp. A-1—A-49. The further opinion of the National Labor Relations Board is reported in 220 N.L.R.B. 88; and a photo copy is annexed hereto in Exhibit A, infra, pp. A-51—A-53. The opinion of the United States Court of Appeals of the Seventh Circuit concerning its order of June 23, 1976 is unreported; and a copy is annexed within Exhibit A hereto, infra, pp. A-53—A-55. The further opinion of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing is unreported; and a photo copy is annexed hereto in Exhibit A, infra, pp. A-55—A-58.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on June 23, 1976. A timely Petition for Rehearing was denied on July 23, 1976. The jurisdiction of the Supreme Court of the United States of America is invoked under 28, U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in allowing a layman who was not an attorney to file a brief and argue orally on behalf of the petitioners; or, in the alternative, whether it was error for the Court of Appeals not to have ordered JMCO Trucking, Inc. and United Contractors, Inc. to either retain a licensed attorney to represent it or risk dismissal of the appeal if such a licensed attorney were not retained.

2. Whether it was error for the Court of Appeals and the National Labor Relations Board to find that JMCO and United constitute a single employer within the meaning of the Act.

3. Whether it was error for the Court of Appeals and the National Labor Relations Board to find that JMCO's or United's conduct constituted a refusal to bargain in violation of Sec. 8 (a) (5) and (1) of the National Labor Relations Management Act.

4. Whether it was error for the Court of Appeals and the National Labor Relations Board to find that the truck drivers were laid off in violation of Sec. 8 (a) (3) of the National Labor Relations Management Act.

STATEMENT OF CASE

JMCO was incorporated in December of 1969 and commenced operation in 1970. JMCO is a trucking company and has performed trucking services for various companies and contractors throughout the greater Milwaukee area.

United was incorporated in January of 1969 and is engaged in the general contracting business. United has been a party to several collective bargaining agreements with a number of different unions. Until 1970 United operated two dump trucks and performed a portion of its own heavy trucking work (T. 21). In 1970 these trucks were sold and United has sought trucking services from other trucking contractors in the area, including JMCO (T. 21 and 22).

James L. Mews is an officer and a shareholder of both United and JMCO (T. 16, 156 and 172). The shareholders of JMCO and United are not the same, however (T. 166 and 172).

JMCO and United have in all respects been operated as separate, independent economic entities, a fact attested to at the hearing by a Certified Public Accountant employed by those companies (T. 229). Separate sets of books and records are kept by each company; and each company has a separate bank account (T. 228). The companies do not make loans to one another (T. 229). When JMCO did perform trucking services for United, it was paid at the same rate as the other trucking companies hired by United (T. 229).

United rents yard space, office space and some other services to JMCO; and United is paid a substantial fee by JMCO for these services (T. 190, 192). In 1973 and 1974 such payments totaled $18,700. Prior to 1970, when United owned trucks and hired drivers, United made contributions to the Teamster and Welfare Funds, since it did so for employees belonging to other unions as well (T. 22). United did not have a contract with the charging party, Teamsters Local 200, during that period and paid wages pursuant to a wage schedule per various contracts with the governmental units such as the State Highway Commission (T. 22).

In 1971, JMCO entered into an agreement with Local 200 which had an expiration date of May 31, 1974 (T. 23). It is uncontroverted that JMCO complied with the terms of that agreement.

In late 1973 JMCO informed the drivers that when the agreement with the Teamsters expired, JMCO would try and negotiate a new agreement with the union under which the employees would be paid on a percentage of the hourly earnings of their trucks in some situations instead of the flat hourly rate provided for under the then existing agreement (T. 179). JMCO explained that such an agreement would be financially advantageous to both the company and to the employees (T. 179).

In December of 1973, JMCO provided Local 200 with the required sixty-day notice of termination of the agreement, and on March 19, 1974, a similar notice was sent to JMCO by Local 200 (T. 173-174).

It is uncontroverted that the Union has made no effort whatsoever to contact JMCO regarding a new agreement from December, 1973 until the expiration of the May 31, 1974 agreement (T. 46-47). In fact, no effort at all was made by the Union to contact JMCO until August 20, 1974, almost three months after the expiration of the agreement on May 31, 1974 and nine months after the JMCO notice to the Union (T. 46-47). The record is clear that on August 20, 1974 Duane Kraemer, Business Representative for Local 200, came onto a job site and demanded that JMCO sign the agreement negotiated between Local 200 and the Southeastern Wisconsin Material Handlers Association (T. 177). JMCO is not and has never been a member of that Association. JMCO played no part in the negotiations of that Association's agreement. Further, it is not even engaged in similar activities as that Association (T. 47). This course of events on August 20, 1974 is a classic case of a union refusing to bargain in good faith and a flat refusal of the union to engage in the kind of "give-and-take" which collective bargaining involves.

Despite the Union demands, JMCO, on August 20, 1974, did not cut off negotiations; but rather offered to negotiate a new contract (T. 177, 178). The record is clear that Kraemer of the Union said he was going to get that contract signed "now" or this job is going to be picketed and shut down (T. 178). After being coerced in this manner, and with the threat of a complete job shut down, United came in and agreed that United rather than JMCO

would sign the agreement; and that United would hire Union drivers and rent trucks from JMCO so that the job site would not be picketed (T. 178, 206).

It is undisputed that, in late August and September of 1974, several calls were made to Local 200 by both Mr. Mews of JMCO and his secretary, Dorothy Olson, in an attempt to engage in good faith negotiations between Local 200 and JMCO (T. 175, 176, 221). In each case the attempt was unsuccessful (T. 175, 176, 221-222). To this very day, JMCO has been and remains willing to negotiate an agreement with Local 200, a fact which has been pointed out to the National Labor Relations Board (T. 200). On October 21, 1974 JMCO wrote to Attorney Mandelman of the National Labor Relations Board stating, "This corporation has been and is willing to negotiate a new agreement with Local 200" (T. 193). Despite numerous requests, Local 200 has never met with JMCO until January of 1975, after a complaint had been issued in the instant case.

Milan Mix and Guy Bourdo were originally hired by United in 1968 and 1970, respectively (T. 75, 103). They were later hired by JMCO as truck drivers in August of 1973 and remained in the emplcy of JMCO until September of 1974 (T. 18, 139). While JMCO was a party to the 1971 and 1974 agreements with Local 200, the employees were paid pursuant to that agreement (T. 23).

When the contract expired, JMCO understood that, without a collective bargaining agreement,

JMCO could no longer make payments to the Teamsters Pension Fund and Welfare Fund on behalf of the employees (T. 180). That understanding was based on prior correspondence with similar employee funds. Fredrick Hammer, Business Representative of the Union, confirmed that the Teamsters would not accept contributions unless they were accompanied by the signed contract (T. 45). JMCO, in response to the Union's and the Pension Fund's refusal to accept his contributions and so as to continue compensating his employees properly, began to pay the employees 30% of the $25 per hour charge which the gross rental of a truck, or $7.50 per hour (T. 180). This amount is 85¢ more than the $6.65 per hour rate called for under the then expired Union contract (T. 180). The increase was intended by JMCO to allow the two employees to make their own contributions to the various funds, since JMCO was no longer allowed to make them. The men were told they would have to make those contributions for themselves, and how to do so (T. 180, 223, 224). On June 20, 1974, Mix and Bourdo filed a grievance with Local 200 protesting the new method of compensation (T. 87). Local 200's only action in response to that grievance was to send a letter to JMCO on July 9, 1974 asking that the situation be taken care of (T. 49). The Union took no further action on that grievance and it has never been resolved (T. 36, 37, 48, 50). A further grievance was submitted by the employees on or about September 17, 1974, which also protested this practice and an alleged failure to pay a holiday. In

September, after United had signed an agreement with Local 200, it rented trucks from JMCO and hired Mix and Bourdo to work for United, paying them pursuant to United's agreement with Local 200 (T. 89). However, at the end of September, JMCO became aware that it could not properly lease its trucks to United under its Wisconsin Motor Contract Carrier License; and therefore, was forced by law to discontinue that agreement (T. 184-185). As a result, United advised Mix and Bourdo in late September of 1974 that United would no longer have trucks available for hire to United without drivers; but that they could go to work for JMCO, and they agreed to do so (T. 185).

The first week of October, JMCO explained to both Mix and Bourdo that JMCO still did not have an agreement with Local 200, but wished to negotiate one (T. 185). The employees refused to work for JMCO without a Union agreement (T. 185). Work has been available for and offered to Mix and Bourdo since that time (T. 197).

On January 24, 1975, JMCO wrote to both Mix and Bourdo and informed them that "JMCO remains willing to employ you as a truck driver" and that work would be available on January 27, 1975 (R. Ex. 1, 9). As a result, both employees agreed to return to JMCO's employment as of the date or so thereafter (T. 101, 102, 146).

On December 30, 1974, the Regional Director of the Thirtieth Region, National Labor Relations Board, issued a complaint alleging that JMCO Trucking, Incorporated and United Contractors,

Incorporated constitute a single employer within the meaning of the Act and that such corporations had violated Secs. 8 (a), (3) and (5) of the Act. More specifically, the Regional Director alleged that United and JMCO had refused to bargain in good faith by refusing to apply the terms of a certain Labor Agreement dated August 29, 1974, entered into between United and Teamsters Local 200, to JMCO's operations; by dealing directly with employees regarding employment terms and conditions; and by unilaterally setting employment terms for truck drivers. The Regional Director further alleged that United and JMCO have laid off truck drivers Milan Mix and Guy Gourdo and Percy Williams for engaging in Union and/or prohibited concerted activities.

JMCO and United each denied such allegations by a timely answer to such complaint; and a hearing was held in the case (Case No. 30-CA-2885) before John F. Corbley, Administrative Law Judge, on February 4 and 5, 1975, at Milwaukee, Wisconsin.

On May 30, 1975, said Administrative Law Judge issued his Decision, Findings of Fact, Conclusions of Law, Remedy and Order. On June 30, 1975, JMCO and United by attorneys filed exceptions to the Administrative Law Judge's Decision, Findings of Fact, Conclusions of Law, remedy and Order; and a brief in support thereof with the National Labor Relations Board, Divisions of Judges, Washington, D.C.

On December 19, 1975, the Board issued an Order in which it adopted the recommended Order of the Administrative Law Judge and ordered that United and JMCO, their officers, agents, successors and assignees, take the action set forth in the recommended Order.

Timely Petition for Review of the Order of the National Labor Relations Board was filed with the Court, the United States Court of Appeals for the Seventh Circuit, and an initial brief was filed by petitioners' counsel. Then a respondent's brief was filed by counsel for the National Labor Relations Board. Subsequently, there was a reply brief filed by a layman, Jim Mews, purporting to act on behalf of the petitioners JMCO Trucking, Inc. and United Contractors, Inc. Oral argument was held on April 8, 1976, at which time Jim Mews (not an attorney nor licensed to practice before this or any court) was allowed oral argument and personally appeared on behalf of United and JMCO before the Seventh Circuit Court of Appeals. A decision was subsequently issued on June 23, 1976, which denied the Petition for Review and granted the Cross-Application for Enforcement of the Order.

Previously, on March 19, 1976, the petitioners' attorneys, James T. Harrington and John R. Sapp of the firm of Michael, Best & Friedrich, filed with the Court a motion for leave to withdraw as attorneys for the corporate petitioners; and this motion was granted less than one month before oral argument was scheduled. A layman, James Mews, an officer of JMCO, believed that it would

be impossible for another attorney to familiarize himself with the case in the short time remaining, and did not know how to ask for a postponement, therefore prepared and filed a reply brief himself, on behalf of the two corporate petitioners. Mr. Mews, who is not an attorney, but rather a trucker, conducted the oral arguments on behalf of the two corporate petitioners JMCO and United.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Counsel for Petitioner ask that the Court take judicial notice of a case presently pending before it, that of *United States of America v. Thomas F. Stockheimer,* Case No. 75-1157, which raises and deals with the failure of the Seventh Circuit Court of Appeals to reverse a criminal conviction upon the grounds that the petitioner Stockheimer was defended in a jury trial and represented by a layman, being a disbarred attorney. Counsel respectfully suggests that the issues between the *Stockheimer* case and the instant case with respect to laymen practicing law within the Seventh Circuit's area of jurisdiction are similar and worthy of consideration by this Honorable Court.

The Writ of Certiorari should be granted to resolve conflicts in principal among the lower courts. The decision by the Court of Appeals of the Seventh Circuit with respect to JMCO Trucking, Inc. and United Contractors, Inc. placed the Seventh Circuit in direct opposition to the Sixth, Fourth and Fifth Circuits. For that reason alone,

the Seventh Circuit Court of Appeals' decision should be reversed and remanded for further hearing at the Court of Appeals level.

In support of this position, the petitioners would cite the case of *George L. Ginger v. Avern L. Cohn,* 426 F. 2d 1385 (6th Cir. 1970), a situation which involved an application for attorney fees to a referee in bankruptcy. The Court of Appeals upheld the referee in determining that the allowance of $2,500 to plaintiff's attorney for services rendered prior to the time of attorney's disbarment was error; and that after disbarment the attorney had no standing to continue to represent the bankrupt corporation, even though he was also an officer of the corporation. The following is a quote from the *Ginger* case:

"On appeal Mr. Ginger was permitted to make oral argument *pro se* only with respect to the issue affecting him personally, i.e., the reasonableness of the attorney's fee allowed to him by the referee and affirmed by the District Court. He was not permitted to make oral argument on behalf of the corporation, which as a disbarred attorney he no longer is permitted to represent. Nor can he represent it in his capacity as an officer of the bankrupt corporation. An officer of a corporation, who is not a licensed attorney, is not authorized to make an appearance in this Court on behalf of the corporation. Annotation, 157 A.L.R. 284. As said by Judge Parker in *Acme Poultry Corp. v. United States,* 146 F. 2d 738, 740 (4th Cir.), cert. denied, 324 U.S. 860, 65 S.Ct. 865, 89 L.Ed. 1417: 'The handling of the case in court for the corporation is a matter for its counsel, not for its officers.'"

A similar holding was made in the case of *Algonac Mfg. Co. v. U.S.*, 458 F. 2d 1373 (Ct. Cl. 1972) where it was determined that even an individual who was sole stockholder and president of a corporation, but was not a lawyer, could not appear as attorney for the corporation; even though both he and the corporation were without funds and although he had been unsuccessful in getting another attorney, after the attorney of record had filed a motion to withdraw, which was denied.

The foregoing officer-corporation cases are in line with the case of *Guajardo v. Luna*, 432 F. 2d 1324 (5th Cir. Tex. 1970) where it was held that a son was not entitled to file a civil action on behalf of his father, and further, the requirement that only licensed lawyers may represent others in court was found to be a reasonable rule that does not offend any constitutional guarantee.

The petitioner would also urge that a Writ be issued because an important question is presented in the area of judicial administration in the Federal Court system. The Seventh Circuit Court of Appeals' decision in effect abrogates Rule 46 (a) of the Federal Rules of Appellate Procedure. Rule 46 (a) explicitly provides who may or may not practice before the Supreme Court or the United States Court of Appeals. James Mews did not satisfy any of those requisites and, therefore, should not have been allowed to file a brief nor to argue orally the case before the Court of Appeals on behalf of the corporate petitioners. In fact, it is ironic that a

United States Court of Appeals would allow a layman to represent a corporation, where even in small claims courts throughout the nation a layman is not allowed to represent a corporation.

Counsel feels that the probability that the judgment and opinion below will seriously injure the future administration of justice and law justifies the issuance of a Writ of Certiorari. *Federal Trade Comm. v. American Tobacco Co.*, 47 S.Ct. 663, 274 U.S. 543, 71 L.Ed. 1193 (1927). Is the next step to allow a man to remove his own appendix if he thinks he can handle it? What if laymen were allowed to practice law throughout the courts? If a non-doctor can convince me that he is qualified to take out my appendix or do open heart surgery on me, should he be allowed to do so?

In addition, there is substantial evidence in the records to support a conclusion that JMCO and United Contractors are separate employers within the Act. Principal factors which are weighed in deciding whether sufficient integration exists to treat separate concerns as a single employer are:

1. Inter-relation of operations;
2. Centralized control of the labor relations;
3. Common management; and
4. Common ownership or financial control.

N.L.R.B. v. Welcome-American Fertilizer Co., 443 F. 2d 19 (9th Cir. 1971), *N.L.R.B. v. R.L. Sweet Lumber Co.*, 515 F. 2d 585 (10th Cir. 1975).

In our case, JMCO and United are operated completely separate and are completely separate economic entities (T. 229). Separate books and records are kept for each company; separate bank accounts are maintained; the companies do not make loans to one another, and there is no interchange of employees from one corporation to the other (T. 228). JMCO is only one of many companies which performs trucking services for United. United paid JMCO the same amount as it pays other companies for trucking services; and there is a complete lack of inter-dependence between the two companies.

JMCO and United are not engaged in similar activities, since United is engaged in the general contracting and road building business and United owns no trucking equipment (T. 19, 20). United has had a collective bargaining agreement with the laborers, operating engineers, and cement finishers unions and hires members of those crafts for its contracting work (T. 20, 22). In contrast, JMCO is engaged solely in trucking, pursuant to State licensing and State authority; and JMCO has never performed any of the contracting activities of United (T. 200). It is obvious that there is no inter-relation of work activities. United does rent offices and yard space and facilities to JMCO but, however, this certainly does not make them a single employer for labor relations purposes. Moreover, JMCO pays United a substantial fee for such facilities and services, just as it would any other company from whom these services have been obtained. However, even common ownership

standing alone would not be sufficient for a finding of a single employer. For example, the fact that I own stock in both Ford Motor Company and General Motors does not make them a single employer.

Milo Express, Inc., 212 NLRB No. 57 establishes a precedent which should be followed and applied in this case. The Board in that case held that two trucking companies were separate employers, even though the same individual was the sole stockholder, served as president and director of both companies, and participated in the labor relations of both.

The records in the instant case is devoid of any testimony either by Union officials, employees, or the industry that United and JMCO were considered joint employers. It is noteworthy, for example, that the employees refused to perform any work for JMCO despite the fact that United had a Union contract. In short, the employees refused to perform work for JMCO unless and until JMCO also signed a Union contract. There is substantial evidence in the record to support the fact that the Union bargained in bad faith (or rather refused to bargain at all); but there is no evidence within the record to support the conclusion that JMCO or United bargained in bad faith in violation of the Act. It is uncontroverted that both Mews and his secretary made several attempts in August and September of 1974 to obtain a meeting with Local 200 for the purposes of negotiations (T. 175, 176, 221). JMCO has always

displayed a willingness to negotiate toward the possibility of effecting compromises. In fact, more than two months prior to the issuance of the complaint herein, JMCO, in writing, informed the Thirtieth Region of the National Labor Relations Board, to the attention of Attorney Benjamin Mandelman, as follows:

> "This corporation has been and is willing to negotiate a new contract with Local 200. To date, no representative of Local 200 has contacted us." (T. 193, R. Ex. 8).

No action was taken by the Board, Attorney Mandelman, or the Union to resolve this matter until the issuance of the complaint herein. Finally, at the hearing in this case, Mr. Mews frequently stated that JMCO still wants to negotiate a new agreement with Local 200 and is ready and willing to do so (T. 200). Such action is certainly not evidence of an intent to not bargain in good faith. It is noteworthy that no one took him up on his attempts to negotiate or bargain. The Board in previous decisions has found that bargaining is supposed to be a two-way street. However, it is clear in our case that the Union's activities evidenced a totally fixed and inflexible position and a clear refusal to bargain. In *Ironworkers Local Union No. 103*, 190 NLRB 741 (1971) this type of conduct was found to be a refusal to bargain in violation of Sec. 8 (b) (3) of the Act. The Union must display a "willingness to negotiate toward the possibility of effecting compromises". *N.L.R.B. v. Generac*, 354 F. 2d 625, 628 (7th Cir.

1965). In *Operative Plasterers, Inc. Local 2*, 149 NLRB 1264, where the union had admittedly demanded that the employer sign an agreement without affording him an opportunity to bargain, and had compelled him to do so through economic pressure and threats, the Board stated at p. 1266:

> "Demanding and insisting upon a contract without affording an opportunity to bargain, without intention to bargain collectively in good faith, are sweeping conclusions, as the trial examiner observed, but, if the words have meaning at all, they are hardly susceptible to an interpretation that the respondents have bargained in good faith."

When in addition the Union admits, as the respondents do here, that the employer was thereby compelled to execute a contract, there seems to be no question that this conduct on the part of the Union is proscribed by Sec. 8 (b) (3) of the Act. Also, when the Union refuses to bargain, the employer must have some way of paying the men if they continue to work in determining the basis for payment. Would the Board seriously contend that, with no union contract in existence, the men continue to work but not be paid pending the hope that some day the Union might contact the employer to discuss things? What remedy has an employer? Also, it is noteworthy that a grievance was filed by the Union but not followed up, which is contrary to the bargaining agreement which provides for arbitration for grievances.

The record remains clear that the Union failed to bargain in good faith. When JMCO increased

the rate of compensation upon expiration of the Union contract, this change resulted not from a desire to bypass the Union, but rather from its reasonable belief based upon fact that without a current agreement the company could not make payments to the Teamsters, Pension, or Welfare Funds. Consequently, it provided the additional pay so that the employees could make those contributions directly. It was the company's attempt to provide the workers with protection, not to avoid the Union. It could also be argued that the action by the company was rendered minuscule by the Union's reaction to it since, although a grievance was submitted to the Union June 28, 1974, the Union failed to respond until July 9 when it simply mailed the letter asking that the matter be corrected. No attempt was made to follow up on the grievance (T. 49-50).

There is, also, simply no substantial evidence in the record to support the fact or the allegation that employees were laid off for concerted activities. The record is clear, in fact, that Percy Williams was laid off because of lack of work and dissatisfaction with his driving; and not for protected activities. Mr. Mews on several occasions observed Williams dumping his truck in violation of company rules (T. 186, 187). Williams admitted that he dumped the truck when it was in an improper fashion and that Mews had discussed his driving with him (T. 160). Williams' lay off had nothing to do with his Union activities and, rather, the record is clear that he was laid off because there was complete dissatisfaction with his driving ability and his complete refusal to follow instructions.

Also, the record is clear that at the end of September, JMCO concluded that it could not properly continue to lease trucks to United (T. 184, 185). Therefore, the employees were told that United would no longer be able to offer them work, a decision which had nothing to do with the exercise of protected rights (T. 185).

JMCO informed the employees that they could work for JMCO (T. 185). JMCO also informed the employees that JMCO still did not have a contract, but wanted to negotiate one (T. 185). The decision not to continue working, therefore, belonged solely to Mix and Bourdo. Work has always been available to them when they wanted it, a fact which was clearly pointed out to the Board's representative in writing on October 21 only three weeks after the incident in question.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

LAW FIRM OF JOSEPH W. WEIGEL

By: */s/ Joseph W. Weigel*

Joseph W. Weigel
Attorneys for Petitioners.

APPENDIX

JD-310-75
Milwaukee, Wis.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

UNITED CONTRACTORS INCORPORATED,
JMCO TRUCKING INCORPORATED,
JOINT EMPLOYERS

and Case No. 30-CA-2885

CHAUFFEURS, TEAMSTERS AND HELPERS "GENERAL" LOCAL UNION NO. 200, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AMERICA

William F. Jacobs, Esq., for the General Counsel.

James T. Harrington, Esq. and *John R. Sapp, Esq.* (*Michael, Best & Friedrick*), of Milwaukee, Wisc., for Respondent.

DECISION

Statement of the Case

JOHN F. CORBLEY, Administrative Law Judge: A hearing was held in this case on February 4 and 5, 1975, at Milwaukee, Wisconsin, pursuant to a charge filed by Chauffeurs, Teamsters and

Helpers "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union or Local 200 against United Contractors Incorporated and JMCO Trucking Incorporated, sometimes hereinafter referred to as United, JMCO or, collectively, as Respondent, on October 11, 1974, and served by registered mail on Respondent on the same date and upon a complaint and notice of hearing issued by the Regional Director of the 30th Region of the National Labor Relations Board, on December 30, 1974, which was also thereafter duly served upon United and JMCO. The complaint alleges that United and JMCO are a single employer within the meaning of the Act; that the Union has been the exclusive collective bargaining representative at all times material hereto of the truckdriver employees involved herein and that United and JMCO, individually and collectively, have violated Section 8 (a) (1), (3) and (5) of the Act by: dealing directly in May or June 1974 with their employees, instead of the Union, in respect to their terms of employment; threatening employees with layoff or discharge if they persisted in their union activities or continued to insist upon contractually provided wages or benefits; discriminatorily laying off its truckdriver employees, Mix, Bourdo and Williams in reprisal for their union or concerted activities and insistence on contractual benefits, thereafter refusing to reinstate them and instead replacing said employees with new employees hired at less than contractual rates; and refusing to

bargain in good faith with the Union by failing to apply the terms of United's labor agreement to their trucking operations and employees. In their answer, which was also duly filed, United and JMCO deny that they are a single employer within the meaning of the Act and deny that they have, individually or collectively, engaged in any unfair labor practices.

For reasons which appear hereafter I find and conclude that United and JMCO are a single employer within the meaning of the Act and that they have violated the Act essentially as alleged in the complaint.

At the hearing the General Counsel and Respondent were represented by counsel. The parties were given full opportunity to examine and cross-examine witnesses, to introduce evidence and to file briefs. The General Counsel and Respondent waived the right to make closing arguments. Briefs have subsequently been received from the General Counsel and from Respondent and have been considered.

Upon the entire record in this case including the briefs and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of United and JMCO

United, a Wisconsin corporation, with its principal office located in Menomonee Falls, Wisconsin, is engaged primarily in the business of road construction at various sites located in the Milwaukee County, Wisconsin, area.

During the past calendar year, a representative period, United derived revenues in excess of $50,000 for services it performed for the City of Milwaukee within the State of Wisconsin, said City in turn having purchased goods and services valued in excess of $50,000 from points located directly outside the State of Wisconsin.

JMCO is a Wisconsin corporation with its principal office located in Menomonee Falls and, as will be detailed more fully hereinafter, it is engaged in providing trucking services, substantially for United, at various sites located in the Milwaukee area.

Since I will conclude, *infra*, that United and JMCO constitute a single employer for the purposes of collective bargaining within the meaning of the Act, I find, on the basis of United's services to the City of Milwaukee, that said single employer is an employer engaged in commerce or in operations affecting commerce within the meaning of Section 2 (2), (6) and (7) of the Act./[1]

II. The Labor Organization Involved

The complaint alleges, the answer admits and I find, that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

/[1] *Siemons Mailing Service*, 122 NLRB 81; *Carroll Naslund Disposal*, 152 NLRB 861, enf'd. 359 F. 2d 779 (C.A. 9).

III. Background and Sequence of Events.

A. *The Single Employer Issue*

A proper understanding of the question whether JMCO and United are a single employer within the meaning of the Act necessarily requires a recitation of the corporate history of these two companies and the part played by Jim Mews, who is president of both, in managing the affairs and labor relations of each.

United was organized in January 1965 and is engaged in such general contracting activities as road building, excavation and demolition. Until 1970, United operated its own dump trucks which were driven by employees of United./[2]

JMCO was incorporated in December 1969 and commenced operations as a trucking service in 1970 under a contract motor carrier license issued by the Public Service Commission of the State of Wisconsin.

In 1970 United's dump trucks were sold and its drivers were transferred by Mews to the JMCO payroll. Also in 1970 new dump trucks were purchased or leased by JMCO from Mack Financial Corporation in Chicago and the former United drivers were assigned by Mews to drive them.

/[2] In October 1968, these employees were transferred by Mews to drive trucks for another company, Jim Mews Construction Company, during a strike by Local 200.

Since 1970 United has continued in the road paving, excavation and demolition business but, with the exception of a short time in 1974, as will appear, it has not operated dump trucks with its own drivers. It has, however, utilized the services of JMCO's dump trucks and drivers. Indeed 80 percent to 100 percent of the dollar volume of JMCO's work has been performed for United in each year since 1970. While United also contracts for the services of other trucking companies besides JMCO, 61 percent of United's trucking costs in 1974 involved reimbursements to JMCO. If United's costs attributable to the hiring of readi-mix (concrete) trucks were excluded, United's reimbursements to JMCO amounted to about 88 percent of United's trucking costs in 1974.

Jim Mews is the president of both JMCO and United. Mews' wife, Marlene, is vice-president and secretary of both companies. Mews signs the paychecks for employees of both companies. Mews is the sole corporate stockholder of JMCO. He owns 90 percent of the corporate stock in United, the remaining 10 percent being owned by LaVerne Schlei, United's paving foreman.

Jim Mews directs and controls the employees of both United and JMCO and he hired all the employees of both corporations. Schlei, United's paving foreman, also gives directions to JMCO's drivers. Jim Mews is in charge of the labor relations of both companies and actively directs the operations of each. More particularly, he prepares his own estimates and makes bids on

behalf of United for public road construction jobs. When a bid is accepted he schedules the job and makes arrangements for the equipment including the trucks to do the job. Based on dollar volume as described above, his choice of a trucking contractor has usually been JMCO.

JMCO and United are both located at N59 W14508 Bobolink Avenue, Menomonee Falls, Wisconsin. Dorothy Olson is the office secretary for both JMCO and United and she prepares the payroll for both companies. United and JMCO both have the same accountant, Harold Wernecke, and both companies were represented by the same law firm in this proceeding.

While JMCO has employed only truckdrivers and United, since about 1970 (with the exception of September 1974), employs operating engineers, laborers and cement finishers, United's laborers and operating engineers have driven JMCO trucks and the JMCO drivers have done laborers' work for United. For a time in September 1974 Jim Mews put all of JMCO's truckdrivers on United's payroll. Their duties remained the same, however, as they had been with JMCO and their supervision, which emanated from Schlei or Mews, also remained the same before and after their transfer to United in September 1974.

Although JMCO and United have separate books and records, maintain separate bank accounts, do not make loans to each other and bill

one another for services rendered,/[3] it is clear from the foregoing that the operations of JMCO are substantially integrated with those of United, that employees of the two companies are interchanged, that both corporations are managed, controlled and largely owned by Jim Mews and that he also controls their labor relations including the hiring, transfer and, as will appear, discharge of employees. In these circumstances and based upon all the facts recounted above and the record as a whole, I conclude that United and JMCO are a single employer within the meaning of the Act./[4] They will occasionally be referred to hereinafter, collectively, as Respondent.

B. *Respondent's Hierarchy*

The complaint alleges, the answer admits and I find, that Jim Mews and LaVerne Schlei at all

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/[3]JMCO bills United for trucking services. United bills JMCO for repair work on JMCO's trucks and for secretarial services.

/[4]E.g., *Macke Laundry Service Company of D.C., et al.*, 190 NLRB 1; *Manitowoc Shipbuilding, Inc.*, 191 NLRB 786. The genesis of JMCO's work force as a part of United's, the subsequent return of JMCO's employees to the United payroll, the substantial integration of JMCO's operations with those of United, employee interchange, and Mews' control of the operations of both companies and their labor relations are all facts which distinguish this case from *Milo Express, Inc.*, 212 NLRB No. 57, which is relied upon by Respondent.

times material herein have been, and are now, agents of JMCO and United, acting in their behalf, and their supervisors within the meaning of Section 2 (11) of the Act.

C. *Chronology of Events*

During the period 1966 to 1970 when United operated its own dump trucks using drivers on the United payroll, United made payments for its drivers into Teamsters' pension and welfare funds, just like employers who had collective bargaining agreements with Local 200, even though, according to Mews, United had no collective bargaining agreement with Local 200 at that time.

In 1970, after JMCO had been formed and the former United truckdrivers had gone on the JMCO payroll, JMCO made the instant pension and welfare fund payments. In 1971 JMCO entered into a collective bargaining agreement with Local 200 and thereafter continued these payments and also paid its drivers the wage rates as specified in this contract. These practices obtained throughout the life of this contract which expired on May 31, 1974. All payments into the Teamsters' pension and welfare fund from 1966 to 1974, whether made in the name of JMCO or United, were made on the basis of checks signed by Jim Mews.

In the fall of 1973 Jim Mews began to discuss with his JMCO drivers — outside of the presence of Local 200 — Mews' plans for the future remuneration of the drivers. The place was a

jobsite and the drivers included Milan Mix, Guy Bourdo, Blaine Struve and an employee named Don (apparently Gloede). Mews told his employees that in lieu of an hourly wage plus health and welfare fund payments he wanted to pay them on the basis of 25 or 30 percent of JMCO's charges to the user of its truck services. Mews advised his drivers that under this arrangement the drivers would make their own health and welfare payments. After explaining the operation of this proposal to the drivers Mews asked them if they would accept it. They told Mews they were against it./[5]

/[5]These findings are based on the credible testimony of Bourdo in this regard as essentially corroborated by Mix. To the extent that the testimony of Mews disagrees with these findings, I discredit it. I found Mews to be an argumentative, hence evasive, witness (his own counsel had to correct him in this regard at one point, as the record shows) and I was not satisfied that he testified in a straightforward manner when he testified as to matters in dispute. One aspect of this argumentativeness was his reference to himself as United or JMCO when one or the other denomination suited his position in the case. Finally, his testimony was at odds with the probability of events and other evidence, as I will point out from time to time later in this Decision. Bourdo and Mix on the other hand impressed me as forthright witnesses who testified generally to the best of their knowledge and belief. Moreover, in discrediting Mews' version of this incident which was that he merely told the employees that he intended to negotiate the change to a percentage rate with the Union — I note that he never did so

On December 31, 1973, Jim Mews sent a letter to Local 200 on JMCO stationery advising the Union that JMCO wished to discontinue its collective bargaining agreement and was providing 60 days' notice. Local 200 did not respond to this letter but, instead, on March 19, 1974, sent its own letter to JMCO stating that Local 200 proposed to terminate the then current contract on May 31, 1974. In this letter the Union also offered to meet and confer with JMCO for the purpose of negotiating a new contract.

On March 22, 1974, Mews replied to Local 200's letter of March 19 noting merely that JMCO had already notified Local 200 of JMCO's intention to terminate the contract.

By the end of April 1974 Local 200 had finalized a new contract with the Southeastern Wisconsin Construction Materials Association covering, *inter alia*, various truckdriving operations of its employer-members. Actual copies of the contracts were not printed up until late July or August 1974, although the new wage rates set forth in the contract went into effect on July 1, 1974. Mews was not a member of the Association

(Footnote 5 continued)

and, as will appear, imposed this remuneration system in June 1974 without even offering Local 200 the opportunity to bargain over this change in working conditions.

but, as will appear, he was presented with a contract for his signature in August 1974./[6]

In late May 1974 Jim Mews called driver Mix into Mews' office and again discussed with Mix the matter of going on a percentage rather than an hourly rate. Mews told Mix that the drivers would have the opportunity to make more money on a percentage basis. Mix responded that he did not think this proposal was a good idea./[7]

On about June 7, 1974, Mews had another conversation with Mix in Mews' office in which Mews repeated his desire to pay his drivers on a percentage basis. Mews advised Mix that Mews was "out of" or had "quit" the Union. Mews again tried to persuade Mix that the drivers would make more money on a percentage basis but that they would have to pay their own benefits and would get no paid vacation (contrary to the employer paid benefits and vacation arrangements of the just expired contract with Local 200). Mix agreed to try this arrangement to see what would happen./[8]

/[6]These findings are based on the credible and undisputed testimony of Local 200 representative, Hammer, in this regard.

/[7]The findings as to this meeting are based on the credible testimony of Mix in this regard, which was not denied by Mews.

/[8]These findings are based on the credible and undisputed testimony of Mix in this regard.

In June 1974 (after the expiration on May 31, 1974, of his contract with Local 200) Mews instituted the percentage system which he had been discussing with his drivers since the fall of the previous year. Under the system the employees received a flat $7.50 an hour (as contrasted with their prior contract rate of about $6.65 per hour). However, they received no paid vacations, benefits or holiday pay./[9] The additional $.85 per hour was intended to cover the amounts needed for the employees to make their own contributions to the Teamsters' welfare and pension funds — an arrangement which Mews had explained to the employees and which they understood. This change in the employees' wage and benefit structure was established unilaterally by Mews without negotiating with Local 200.

The change, when implemented, did not sit well with Mews' drivers. As a result Mews telephoned Bourdo and told Bourdo that Mews had heard the drivers were disgusted with the new rate. Bourdo admitted that this was true, pointing out that as far as he personally was concerned he could not offer to pay his own benefits.

/[9]The finding that they received no holiday pay is based on the credible testimony of Mix in this regard who stated that he received no pay for July 4th or Labor Day. Mews testified that he did not know if the employees were paid for Labor Day and only "believe(d)" they were paid for July 4th. I credit Mix here for the reason, among others, that holiday pay was not mentioned and is indeed inconsistent with, Mews' percentage program.

Bourdo thereafter spoke with Mix and the two agreed that they were losing too much money under the new arrangement. They further decided to file a grievance and contacted Local 200 to obtain its assistance.

Several days after the Mews-Bourdo telephone call Local 200 representative Jerry Sprague delivered the grievance form to Bourdo and Mix. Mews saw Sprague at the jobsite and asked Bourdo what the problem was. Bourdo explained that the drivers were not going for the new percentage pay. Mews argued with Bourdo that the drivers would make more money under the new system but Bourdo insisted that they would lose money. Mews then told Bourdo that Mews desired no trouble with the Union and that Mews would return to the old payment system.

Bourdo and Mix had dined together that evening, discussed the matter of the grievance and agreed to delay filing it in order to give Mews the opportunity to carry out his promise to Bourdo.

When Bourdo and Mix received their next paychecks they observed that Mews was continuing to pay them on a percentage basis. On June 28, 1974, Mix and Bourdo jointly filed a grievance with Local 200 complaining that since the expiration of the last contract Mews had put them on a percentage remuneration, had taken away their vacation and holiday pay, had required them to pay their own benefits and had taken away their driving time to a jobsite.

This grievance was given to Local 200 and eventually came into the hands of its business representative, Hammer. On July 9, 1974, Hammer wrote a letter to Mews enclosing the June 28 grievance and informing Mews that Mews was in violation of "the Labor Agreement." The letter continued that, if Mews did not correct the situation covered by the grievance immediately, Local 200 would take all necessary economic action to correct the situation. Mews did not reply to this letter and took no action. As will appear, Mews' failure to act was based on his position that without a collective bargaining agreement with Local 200, he had no responsibility to act on its grievance./[10]

As previously found, Local 200 completed its negotiations with the Southeastern Wisconsin Construction Materials Association covering, *inter alia*, the truck operations of the employer-members of that Association. Copies of the contracts were returned from the printer in July or August 1974.

On or about August 8 or 9, 1974, Local 200 representative Duane Kraemer took several copies

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/[10]The findings as to the change to the percentage rate, the sequence of events involving Bourdo and Mews and the filing of the June 28 grievance are based on the credible testimony of Bourdo in this regard as corroborated in part by Mix and corroborated or not disputed by Mews. Mews did not execute a new contract with Local 200 at any time during the period May 31, 1974 until August 20, 1974.

of the new contract and visited the office of JMCO and United at Menomonee Falls, Wisconsin. Mews was not present at the time so Kraemer spoke to the office secretary, Dorothy Olson. Kraemer told Olson that Kraemer was from Local 200 and that he had the new contracts. Olson told Kraemer that Mews was not going to sign them. Kraemer left the contracts anyway and departed./[11]

On about August 20, 1974, Kraemer in the company of another Local 200 representative, Jerry Sprague, visited a jobsite at which Mews was working and spoke to Mews. Kraemer asked Mews if he would sign the new contract. Mews responded that he had contracts in his office and that he would sign them and mail them in. Kraemer turned down this offer pointing out that he, Kraemer, had brought other copies of the new contract with him. Mews then advised Kraemer that he, Mews, did not intend to sign a contract for JMCO because it was

/[11]These findings are based on the credible testimony of Kraemer in this regard. I do not credit Olson's testimony to the extent it is contrary to that of Kraemer's. Olson's testimony was characterized by an element of uncertainty which I did not find, generally, in that of Kraemer's. Moreover, I find in Olson's testimony no precise denial that Kraemer left contracts in the office.

In its brief, Respondent contends that Olson should be credited as a disinterested witness. I reject this contention. Olson is a paid employee of United who works for both United and JMCO and who also works directly for Mews as his office secretary.

too much paper work for three or four people. Mews said he would instead put the drivers back under United.

Kraemer, being recently appointed as a business representative, was uncertain whether such an arrangement would be proper. Kraemer and Sprague then left the premises and Kraemer telephoned Hammer and inquired if Mews' proposal was acceptable. Hammer replied that it was.

Kraemer and Sprague then returned to the jobsite on the same day where both Mews and Kraemer signed a copy of the contract and its addendum. Mews signed as President of United Contractors Inc. This contract is effective from June 1, 1974 to May 31, 1977.

Kraemer then asked Mews about the grievance which had been filed (by Bourdo and Mix) protesting the nonpayment of their fringe benefits. Mews responded that, insofar as he was concerned, there was no contract/[12] so there was no grievance. Kraemer responded that if this was Mews' position, Mews should put it in writing and send it to him./[13]

/[12]Apparently speaking of the time when the grievance was filed on June 28, 1974.

/[13]These findings are based on the credible testimony of Kraemer in this regard, as corroborated by Sprague and also corroborated in part by Mews. To the extent that the testimony of Mews is contrary to that of Kraemer, I do not

In late August 1974 another driver, Percy Williams, was hired by Mews.

For a time after the August 20 collective bargaining agreement with United covering the drivers was signed, these three drivers, i.e., Mix Bourdo and Williams (who, according to paychecks submitted in evidence, were the only drivers employed at the time),/[14] continued to be paid on JMCO checks and on the percentage basis which had been in effect since June 1974. In September all the employees were paid with checks drawn on

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(Footnote 13 continued)

credit Mews nor do I credit the testimony of Mews, denied by Kraemer, that Kraemer told Mews that if Mews did not sign the contract right at that time the job would be picketed or shut down. I have already commented on the credibility of Mews and Kraemer, respectively.

In discrediting Mews here I also note the following. Among other things denied by Mews was that he told Kraemer that JMCO was so small that it was not worthwhile from an administrative standpoint for JMCO to continue in business. Mix credibly testified on cross-examination that Mews told him, Mix (after Mix began working in September 1974 on the United payroll), that the reason why Mix was no longer working for JMCO was that it would involve too much bookwork or paperwork to continue JMCO as the employer of two or three drivers.

/[14]Another JMCO employee, Richard Benson, was not paid after August 23, 1974, hence must have terminated by that date.

United and Bourdo began receiving the contract wage rate. Williams or Mix continued to receive the percentage rate, however, and neither Mix nor Bourdo received holiday pay for July 4th and Labor Day. Williams likewise received no pay for Labor Day.

Mix conferred with Bourdo about these matters and they agreed that Mix would prepare a grievance ("complaint form") to be filed with Local 200. This was done by Mix on September 17, 1974, but the grievance named both Mix and Bourdo (misspelled on the form) as the grievants. The grievance stated that "Wages and Holliday (sic) pay have not been straightened out from now to June 1, 1974."

On September 26, Local 200 representative Kraemer forwarded this grievance to Mews enclosed with a letter in which Kraemer requested Mews to advise Local 200, in writing, of the grievance's disposition.

On or about September 27, 1974, Kraemer visited Mews at the latter's office. Kraemer sought to discuss with Mews the latter's failure to pay fringe benefits to the drivers. Mews admitted that he had not paid these benefits but took the position that he, Mews, had no contract and that there could therefore be no grievance. Kraemer responded that Mews should put his position in writing. On October 1, 1974, Mews sent Local 200 a letter stating that Mews' response to Local 200's

letter of September 26 was that JMCO had terminated its contract with the Union./[15]

On or about September 30, 1974, Mix reported for work and found a note on his (Mix's) truck, signed by Mews, telling Mix not to start work until Mews spoke to him. Mews was away from the shop at the time so Mix waited for him. A little while later on the same morning, Mews arrived. Mews asked Mix what "Mix was trying to pull." When Mix inquired what Mews meant, Mews showed Mix the grievances he had filed and the letter from the Union, all of which Mews had attached to a clipboard. Mews then asked Mix how they could work like this "with three parties involved" (the parties apparently being the employer, Mews and the Union). Mews then asked Mix why he had filed the grievance. Mix responded that Kraemer and Hammer from Local 200 had advised him that Mews could not operate by paying a percentage rate to the drivers. Mix also told Mews that Hammer had told Mix that Mews was supposed to be making the health and welfare payments for the drivers. Mix added that he, Mix, was particularly anxious to straighten out the health insurance

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/[15]The findings as to the meeting on or about September 21, 1974, are based on the credible testimony of Kraemer in this regard, which was not denied by Mews. Mews testified only that no union representative met with him for contract negotiations during this period. Olson, Mews' secretary, testified that she saw Kraemer talking to Mews at Mews' office on one occasion.

payments because Mix's son needed an expensive medical brace. After some further discussion of the medical payments Mews told Mix that Mix had better turn in his truck keys until the matter was straightened out. Mews told Mix that Mix should contact the Union to accomplish this. Mix then put his keys on the table and asked Mews if Mews was firing him. Mews told Mix that Mix was laid off and that Mews had no further work for him. Mix then left./[16]

On or about October 4, 1974, Bourdo met Mews at the shop and Mews gave Bourdo his paycheck. Mews then asked Bourdo if Bourdo had any company keys. When Bourdo admitted that he did, Mews told Bourdo to turn in these keys and that there would be no work for Bourdo until he got his labor or union problems straightened out. Mews

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/[16]The findings as to this incident are based on the credible testimony of Mix in this regard, as not directly denied by Mews. In Mews' version of the incident, Mews stated that he sought to have Mix contact the Union so that Mews and the Union could bargain for a contract covering JMCO. Mews also testified that he merely laid off Mix from United and offered Mix a job with JMCO, which Mix refused, because JMCO did not have a union contract. To the extent that Mews' version differs from that of Mix, I do not credit Mews. More will be said in my "Concluding Findings" in respect to Mews' claimed efforts to negotiate a contract for JMCO and in regard to my reasons for discrediting Mews' version of Mix's discharge (and also Mews' version of Bourdo's discharge).

also told Bourdo that he, Mews, had spoken to Kraemer and Mews then asked Bourdo why "you guys" had waited 6 months to turn in a grievance. Bourdo denied that they had waited 6 months, pointing out that they had turned in their first grievance in June 1974. Bourdo then said that there was no point in arguing about the matter since it was in the Union's hands./[17]

Also on or about October 4, Percy Williams reported to Mews at a jobsite with a truck. Mews gave Williams his check and told Williams to take the truck back to the shop and leave the keys in it. Williams did as he was directed. No mention was made to Williams at this time that he was being laid off nor was he criticized at the time for any prior deficiencies in his driving./[18] Williams has not subsequently been reemployed by JMCO or United.

/[17]These findings are based on the credible testimony of Bourdo in this regard. I do not credit the contrary version of Mews which was the same as that already discredited in respect to Mix.

/[18]These findings are based on the credible testimony of Williams in this regard. Williams impressed me as a forthright witness who testified in a straightforward manner. His candor is well demonstrated by his ready admissions in respect to criticisms made by Mews and Schlei in August 1974 about deficiencies in his driving. These matters will be discussed in my "Concluding Findings." I do not credit Mews' contrary version of Williams' separation. I have already commented on Mews' credibility.

On or about October 6, an advertisement appeared in a local newspaper for five axle semi-drivers with Jim Mews' home phone number. Bourdo had been driving this type of truck when last employed by Mews in September.

On or about October 8, 1974, Bourdo went to a jobsite where he observed JMCO trucks (his and Mix's) in operation. He spoke to at least one of the drivers who said he was not a union member. On this same occasion Bourdo observed Mews in conversation with a representative of the Operating Engineers and telling this individual about Mews' dispute with the Teamsters. On about the same date Mix also observed his and Bourdo's trucks being driven by other drivers.

On or about October 13, 1974, Williams called Schlei to inquire why Williams wasn't working. Schlei replied that only a small job was in progress at the time and that Mews was away. Schlei said other work would be coming up and he would let Williams know. Williams has not subsequently been contacted./[19]

On or about October 14, 1974, Williams also observed Mix's and Bourdo's trucks being driven by other drivers./[20]

/[19]Mews testified that no work was available for Williams during October, November and December 1974.

/[20]Mews admitted that two of his trucks were in operation during October, November and December 1974.

By letter, dated January 24, 1975, JMCO, through its attorneys, offered Bourdo and Mix reemployment to begin on January 27, 1975, with wages and hours as provided in the latest contract between Local 200 and Southeastern Construction Materials Association (the same as the contract between United and Local 200, executed on August 20, 1974) although the letter denied that JMCO was bound by that contract. Both Mix and Bourdo had agreed to return to work at the time of the hearing on February 4, 1975.

Concluding Findings; Respondent's Defenses

A. The Appropriate Unit; Local 200's Majority; Unilateral Changes in the Drivers' Terms and Conditions of Employment

A unit of truckdrivers is appropriate for collective bargaining within the meaning of Section 9(b) of the Act./[21] Here it is clear that Mews has always considered his truckdrivers as a separate group and there is a history of bargaining in which they have been represented in their own unit. Thus, when they were employed by United prior to 1970, he paid welfare and pension benefits on their behalf into the Teamsters' fund. From at least 1971 to May 31, 1974, Mews, as JMCO, was a party to a collective bargaining agreement with

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/[21] *Ballentine Packing Company, Inc.*, 132 NLRB 923.

Local 200 covering their terms and conditions of employment. Inasmuch as Mews admitted that JMCO was and is only involved in truckdriving operations, and in the absence of any showing that JMCO ever had employees in any other classification on its payroll, I conclude that Mews' truckdrivers were the only employees covered by the instant agreement. Further in August 1974, when Mews, as United, entered into the 1974-1977 collective bargaining agreement with Local 200, such agreement was applied to Mews' truckdrivers at least for a time in September 1974 after Mews transferred them all from the JMCO payroll to that of United. It does not appear that any other United employees were covered by this agreement. Indeed Mews admitted at the hearing that United has collective bargaining agreements with the Laborers Union, Cement Finishers and Operating Engineers covering other United employees.

In these circumstances and in view of my finding that United and JMCO are a single employer within the meaning of the Act, I conclude that a unit of truckdrivers employed by United and/or JMCO is an appropriate unit within the meaning of Section 9(b) of the Act.

In its answer to the complaint Respondent admits that Local 200 is, and was at all times material herein, the duly designated majority representative of JMCO's truckdrivers, but denies that United has any truckdrivers on its payroll. In view of this admission, and also in consideration of my finding that United and JMCO are a single

employer within the meaning of the Act coupled with the fact that Mews, as United, entered into a collective bargaining agreement covering the truckdrivers with Local 200 on August 20, 1974, without raising any question of Local 200's majority status, I further conclude that Local 200 is, and has been at all times material herein, the exclusive majority representative of the appropriate unit of Respondent's (United's and/or JMCO's) truckdrivers within the meaning of Section 9(a) of the Act. Further supporting this conclusion are: the presumption of majority that attaches to Respondent's continuous dealings with Local 200 as the truckdrivers' exclusive representative;/[22] the fact that when the 1971-1974 contract expired on May 31, 1974, the only employees who received paychecks from JMCO at that time were Mix, Bourdo and Duquaine, at least two of whom (Mix and Bourdo) were members of Local 200 and the further fact that at about the time the 1974-1977 contract was executed by Mews (as United) in August 1974, the only truckdrivers were Mix, Bourdo and Williams, all of whom were members of Local 200.

Inasmuch as Local 200 is, and has been, the exclusive majority representative of Respondent's truckdrivers at all times material herein, it follows that at such times Respondent was obligated to deal directly with Local 200 — and not with its employees — in respect to the wages, hours and

/[22]*Manor Research Inc.*, 165 NLRB 909.

other terms and conditions of employment of the truckdrivers. I, accordingly, conclude that by Mews' efforts to negotiate a percentage wage system with his employees in May and June 1974 and by Mews' implementation of that system in June 1974 and thereafter (including not only the change in wages but also the elimination of vacation and holiday pay and the elimination of payments to the Teamsters health and welfare fund) without negotiations with Local 200, Respondent has violated, and is violating, Section 8(a) (1) and (5) of the Act./[23]

I shall treat with Respondent's subsequent refusal to honor its contract of August 20, 1974, later in this Decision, after disposing of the allegations of the complaint in respect to the discharges of all three of the Union's drivers in early October 1974.

/[23]*N.L.R.B. v. Katz, et al.*, 369 U.S. 736; *Tulsa Sheet Metal Works*, 149 NLRB 1487, 1503, enf'd 367 F. 2d 55 (C.A. 10). The General Counsel further urges that Respondent's refusal to process the June 28 grievance was in violation of Section 8 (a) (5) and (1). Since the complaint does not allege this omission to be an unfair labor practice I shall make no unfair labor practice findings in respect to it. In any event, the subject matter of the grievance was Respondent's unilateral change in working conditions which I have found to be a violation, *supra*, and for which I shall recommend a remedy.

Respondent's sole defense, which I reject, in respect to this matter is as follows. Respondent says that Mews raised the pay of his drivers to a figure (based on a percentage of the trucks' use

B. The discharges

Based on my findings, *supra*, it is manifest that Mix (on or about September 30, 1974) and Bourdo (on or about October 3, 1974) were discharged because they had filed the grievance with Local 200 over Respondent's failure to provide them with the wages and holiday pay due them under the contract executed by Mews on August 20, 1974 (which was effective from June 1, 1974).

Respondent's defense in respect to these discharges is based on the testimony of Mews that he merely laid off Mix and Bourdo from United and then offered them work with JMCO, which they refused. More specifically, Mews testified that after he had signed the contract of August 20, 1974, in the name of United, he transferred his drivers to

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(Footnote 23 continued)

charge) which translated for their purposes into $7.50 an hour. The .85 excess of this amount over union scale was intended, Respondent says, to provide funds to the employees to make their own welfare and pension fund contributions because Mews believed that the fund would not accept such payments from Mews without a contract. Mews' belief in this regard purportedly developed from his dealings with other unions which had such a "no contract-no fund payment" policy.

I reject this defense because it is irrelevant to the issue. What arrangements Mews may, or may not, have thought were proper have no bearing on his obligation to bargain with the exclusive representative of his employees in relation to their wages, hours or other terms and conditions of

the United payroll but United continued to rent trucks from JMCO. Mews said he then learned that this procedure might cause him to lose his motor carrier license from the State of Wisconsin pursuant to which JMCO was required to provide both trucks and drivers to contractors requesting JMCO's services. To avoid this penalty, Mews claimed, he then simply laid off Bourdo and Mix from United but offered them work with JMCO. He testified that both Bourdo and Mix refused to work for JMCO under nonunion conditions despite Mews' claimed requests to them at that time to persuade Local 200 to meet with him and negotiate a contract with JMCO — requests which, according to Mews, were in addition to attempts he and his secretary had made to get an appointment with Local 200 representatives to enable Mews and the Union to bargain for JMCO employees.

(Footnote 23 continued)

employment. Any substantial change in those conditions of employment, as here, made by an employer unilaterally is in derogation of that duty and is in violation of the Act. *N.L.R.B. v. Katz et al., supra*.

In addition to the foregoing I am constrained to observe since it relates to Mews' credibility, that his claimed mistaken belief that the Teamsters' fund would not accept his health and welfare payment without a contract is directly contradicted by his earlier claim that he made such payments to that fund during the period 1966 to 1970 at a time, he said, when he had no contract with Local 200.

Respondent takes the position that Mix and Bourdo continued to refuse work with JMCO until their reemployment under union conditions in 1975, which has been described. It also points out a letter from Mews to the NLRB Regional Office dated October 21, 1974, in which Mews advised the Region that Mix, Bourdo and Williams were offered work with JMCO on October 8, 1974, but refused it and further advised the Region that work had been available to them since that time.

I have already rejected, on the basis of my credibility findings, Mews' version of the separation of Mix and Bourdo as well as that of Williams of which more will be said hereinafter. It follows that Respondent's defense — (that Bourdo and Mix were not discharged in October 1974 but instead refused employment with JMCO at that time) — must fail.

I will explain my credibility findings in this regard in more detail at this point, because these findings relate so intimately to Respondent's defense. I have rejected Mews' claimed revelation about the possible loss of his motor carrier license because his testimony in this regard is substantially inconsistent with his own earlier testimony that the reason he carved out United's trucking operation in 1970 and used it as a base to establish JMCO was to enable him to obtain a license as an exclusive contract carrier. If he knew the requirements for such an exclusive license in 1970, he obviously knew them in 1974.

His claim that he could not get Local 200 to send a representative to bargain with him in September 1974 is at odds with the fact that Kraemer came out to see Mews personally on or about September 27, 1974, — at the very time these events were taking place — to discuss with him Mix's and Bourdo's grievance of September 17, 1974, which dealt with contract matters./[24] There is no indication that Mews made any effort at this meeting to negotiate a contract in the name of JMCO although he must have known — from Kraemer's signing of the August 20, 1974, contract in the name of United — that Kraemer had authority to negotiate a contract.

Mews' letter of October 21, 1974, to the Board's Regional Office likewise belies his testimony. That letter recites the following, in pertinent part:

On August 30, 1974, Milan Mix, Guy Bourdo and Percy Williams left our employment and went to work for another firm. These former employees were offered work on October 8, 1974 under the same terms of their employment since the expiration of our contract with Local #200 May 31st, 1974. They declined to work. Work has been

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/[24]While I will find such claimed efforts to be irrelevant to the Section 8 (a) (5) allegations of the complaint, such claims nonetheless bear on the credibility of Mews' testimony in connection with the Section 8 (a) (3) allegations.

available for them. This corporation does not have a contract with Local #200./[25]

Since Mix, Bourdo *and Williams* are all named in the first sentence of this paragraph, the obvious intention of the phrase "These former employees," appearing in the second sentence, is the inclusion of Mix, Bourdo *and Williams*. The pronouns "they" and "them" appearing in later sentences (in the absence of any statement to the contrary) also must be presumed to include Mix, Bourdo *and Williams*. While the letter states that work has been available for "them" (i.e. all three) Mews testified at the trial that only two of his trucks were in operation from October 1 to December 31, 1974, and that there was no work for Williams during this period even if Williams had wanted to come to work.

A further reason for my discrediting Mews' version of the separation of Mix and Bourdo is that he admittedly did not contact unemployment authorities to inform them of his claim that Mix and Bourdo were refusing to work even though, he said, he was aware that both were drawing unemployment compensation. Mews also claimed that Mix and Bourdo were on strike during this period but the record is barren of any suggestion

/[25]Even this letter is evasive. On or about August 30, 1974, Mix, Bourdo and Williams hadn't "left ... employment" — they were transferred by Mews. The other "firm" they "went to work" for was United!

that Local 200 picketed at Mews' office or any of Mews' projects. Finally, unlike many of Mews' other actions in this case, he did not then make any written offer of reemployment by JMCO to Mix or Bourdo.

In view of the foregoing I am satisfied that Mix and Bourdo were discharged by Respondent on or about September 30 and October 4, respectively, for the reason that they, in concert, filed grievances against Respondent over working conditions and that Respondent thereby violated Section 8(a) (1) and (3) of the Act./[26]

Since Mews criticized both Mix and Bourdo in their discharge interviews about their filing of a grievance and further told them that there would be no work for them until they got their union problems straightened out, I find that Respondent

/[26]E.g. *Chatfield Paper Corporation*, 172 NLRB 307. Even if I were to accept Mews' explanation, which I have not, that Mix and Bourdo refused to work under nonunion conditions, I would nonetheless conclude that Respondent, by offering them work only under nonunion conditions, constructively discharged them in violation of Section 8 (a) (1) and (3) of the Act. *Barwise Sheet Metal, Inc.*, 199 NLRB 372. My reasons for so concluding would be that (as will be more fully discussed hereinafter) the United contract of August 20, 1974, was also binding on JMCO (since the two corporations are a single employer within the meaning of the Act) and therefore, these employees were entitled to work under the conditions set forth in that contract.

also thereby threatened both Mix and Bourdo with reprisal for the exercise of their Section 7 right to engage in union activities and that Respondent thus violated Section 8 (a) (1) of the Act./[27]

This brings us to the discharge of Williams. Williams has been a member of Local 200 since 1958. I conclude that Mews was aware of Williams' union affiliation because when Mews hired Williams in August 1974, Mews made a point of telling Williams that he, Mews, did not then have a contract with Local 200 — a comment which would have been unnecessary unless Mews knew or suspected that Williams was a Local 200 member. It should also be noted that Williams, as an employee in the truckdrivers unit, would have been a beneficiary of the successful prosecution of the Mix-Bourdo grievance of September 17, 1974, even though he did not sign it or participate in the filing of it.

In its brief Respondent argues that Williams was laid off because of lack of work and because of Mews' dissatisfaction with Williams' performance as a truckdriver. I conclude, however, that neither of these reasons was the cause of Williams' separation.

To begin with, no mention was made of either matter when Mews asked Williams for the keys to

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/[27]See *Trailmobile Division, Pullman Incorporated v. N.L.R.B.*, 407 F. 2d 1006, 1008 (C.A. 5).

Williams' truck, which was the last time prior to the hearing when Mews spoke to Williams./[28] Further, Williams' testimony stands unrebutted that the driving incidents/[29] (which occasioned the criticisms by Mews and Schlei of Williams' driving performance) both occurred in August. This means that Mews must have been satisfied with Williams' overall performance because Mews continued to employ Williams for a month after the incidents occurred. And there is no indication that the poor performance was repeated during that month. Finally, while I have given no weight to Mews' letter to the Board, dated October 21, 1974, as support for Mews' claim that he offered Mix and Bourdo employment on October 8, 1974, this letter nonetheless stands as an admission that Mews was sufficiently satisfied with Williams' performance to reemploy him. For this letter, which has been discussed and analyzed *supra*, makes no mention that Williams was discharged nor that he had been

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/[28]I have already discredited Mews' testimony that he told Williams at that time that Williams was being laid off due to lack of work and poor performance.

/[29]In one incident Mews criticized Williams for dumping at a time when his dump truck was not level. In another incident Schlei criticized Williams for rolling off (apparently moving his truck after a dump) before lowering the dump box into place.

a substandard employee./[30] It rather avers that, as of October 21, 1974, Mews had work available for Mix, Bourdo and Williams.

I therefore conclude that Williams was discharged because he was a member of Local 200 and stood to benefit from the Mix-Bourdo grievance — the very grievance which had caused the discharges of Mix and Bourdo.

With the discharge of Williams, Mews had rid himself of his last union truckdriver and set the stage, at least in Mews' mind, for him to hire nonunion drivers to replace his union drivers. I, accordingly conclude that by discharging Williams, Respondent violated Section 8 (a) (1) and (3) of the Act./[31]

C. *The Ultimate Refusal to Bargain*

The complaint alleges that Respondent has, since September 1974, refused to bargain collectively with Local 200 by failing to apply "United's" agreement with Local 200 to

/[30]Mews, in any event, waffled on cross-examination as to his reasons for discharging Mews. He ultimately testified that he did not terminate Williams because of his poor performance but rather for lack of work.

/[31]I deem of no significance Williams' testimony that, as far as he knew, his separation had nothing to do with the Union. For Williams could not necessarily be expected to know what motivated Mews in discharging him.

Respondent's trucking operations and employees. In its answer to the complaint Respondent admits that JMCO has not applied the "United" contract to its trucking operations and employees by reason, Respondent says, of the separate identity of these companies. It also appears that, in view of Mews' testimony that United is no longer engaged in trucking operations, there are no "United" operations to which the "United" contract with Local 200 can be applied. In sum it is clear that Respondent — either as United or JMCO — did not apply the "United" contract to Respondent's trucking operations or employees at least from the beginning of October 1974 until it rehired Mix and Bourdo just prior to the hearing — and even then without agreeing that it was bound to do so.

Respondent offers essentially two defenses to its failure to live up to its contract with Local 200. First it says that, since United and JMCO are separate employers, there is no obligation for JMCO to honor United's contract with Local 200. Secondly, it argues that, even if United and JMCO are a single employer, the United contract is a nullity because it was entered into by Mews under threats of strikes and picketing by Kraemer.

I reject Respondent's first defense for the reason that, as I have found, United and JMCO are a single employer within the meaning of the

Act./[32] Respondent's second defense must also fail because, on the basis of my credibility findings, I have concluded that no such threats were made by Kraemer to Mews at the time the contract was executed./[33] I further conclude that Mews' insistence that the contract be entered into in the name of United was just another aspect of his lack

/[32]This renders irrelevant Mews' claimed efforts to negotiate a contract with Local 200 on behalf of JMCO in September 1974. There was no need for Local 200 to negotiate a contract. It already had one. But if Mews was truly interested in negotiating a contract for JMCO in September 1974, as he claimed, he offered no explanation of his failure to bring this matter up with Kraemer when, as has been mentioned, Mews and Kraemer met on September 27, 1974.

/[33]Even if I were to find, which I have not, that Kraemer had made such a threat, I would nonetheless conclude that the contract was validly executed. For economic pressure of this type is not *in and of itself* inconsistent with a labor organization's a duty to bargain in good faith with an employer. *N.L.R.B. v. Insurance Agent's International Union (Prudential Insurance Co.)* 361 U.S. 477, 490-491. It is only when such pressure is coupled with evidence, significantly lacking here, of a union's intention not to afford an employer the opportunity to bargain collectively and such union's further intention not to bargain in good faith, that such pressure becomes unlawful and would negate the effect of any resulting collective bargaining agreement. Compare *Operative Plasterers' and Cement Masons' International Association Local #2, AFL-CIO*, 149 NLRB 1264.

of good faith and evasiveness in dealing with Local 200. Consistently, after entering into the contract, Mews delayed putting its terms into effect. Eventually he discontinued the shortlived United trucking operations and discharged all of his union drivers after a grievance was filed in respect to his performance under that contract. Indeed his entire course of conduct strongly suggests, and I find, that he never had any intention of living up to the United contract of August 20, 1974.

In view of all the foregoing, I conclude that by failing to apply the terms of "United's" contract with Local 200 to Respondent's trucking operations and employees at all times since early October 1974, Respondent has refused to bargain in good faith with Local 200 in violation of Section 8 (a) (5) and (1) of the Act./[34]

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate and substantial relation to trade,

/[34]See *Barwise Sheet Metal Co., Inc., supra*. While it is true that Respondent rehired Mix and Bourdo under the conditions set forth in that contract, its letter of reinstatement to Mix and Bourdo makes clear that Respondent takes the position that no valid agreement exists between it and Local 200.

traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. Conclusions of Law

1. United and JMCO are a single employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By threatening Milan Mix and Guy Bourdo with reprisal for engaging in union or other concerted activities Respondent has violated Section 8 (a) (1) of the Act.

4. By discharging Milan Mix, Guy Bourdo and Percy Williams, Respondent has violated Section 8 (a) (1) and (3) of the Act.

5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

> All truckdrivers employed by United or JMCO excluding all other employees, guards and supervisors within the meaning of the Act.

6. At all times on and since June 1, 1974, the Union has been the exclusive collective bargaining representative of the employees in the aforesaid unit within the meaning of Section 9 (a) of the Act

in respect to their wages, hours, and other terms and conditions of employment.

7. By dealing directly with its employees in respect to the terms and conditions of employment of its employees in the appropriate unit found above and by changing such terms and conditions of employment on and after June 1, 1974 without bargaining with the employees' exclusive collective bargaining representatives, Respondent has violated, and is violating, Section 8 (a) (5) and (1) of the Act.

8. By failing to abide by the terms of its contract executed on August 20, 1974, with the Union, Respondent has violated, and is violating, Section 8 (a) (5) and (1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

The recommended Order will contain the conventional provisions for cases involving findings of interference, restraint, coercion, unlawful discharge and unlawful refusal to bargain in violation of Section 8 (a) (1), (3) and (5) of the Act. This will require Respondent to cease and desist from the unfair labor practices found and to post a notice to that effect which will also state the affirmative action Respondent will be required to take to remedy these discharges and its refusal to bargain with the Union.

Thus, Respondent will be required to offer Mix, Bourdo and Williams reinstatement to their former or substantially equivalent positions,/[35] without prejudice to their seniority or other rights and privileges. Each will be made whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he would have earned from the date of the offer of reinstatement, less his net earnings, if any, during such period to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, with 6 percent interest thereon as required by *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Having found that Respondent has violated Section 8 (a) (5) and (1) of the Act by refusing to honor or abide by its agreement with the Union, I shall also recommend that it be required to honor and abide by that agreement for its term./[36] This will require that Respondent provide all the

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/[35]In so recommending I am not unmindful that Mix and Bourdo have already been reinstated. But since Respondent questions their right to reemployment under the conditions of the August 20, 1974, contract with the Union, this order of reinstatement will insure their employment without question under the provisions of that agreement, *viz* substantially equivalent employment in this context means, *inter alia*, employment under working conditions provided by the instant union contract.

/[36]*Eklund's Sweden House, Inc.*, 203 NLRB 413.

employees who were in the collective bargaining unit on or after June 1, 1974, any wages, paid holidays, paid vacations, or other benefits which have not already been paid under the provisions of the agreement which is effective from June 1, 1974 to May 31, 1977. To further insure that Respondent will live up to its bargaining obligation I shall also recommend that Respondent be directed to bargain upon request with the Union and, if any further understanding is reached, that such understanding be embodied in a written agreement.

Finally, it will be recommended, because of the nature of the unfair labor practices in which Respondent has engaged (see *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536), that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed employees of Section 7 of the Act.

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:/[37]

/[37]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, United Contractors Incorporated and JMCO Trucking Incorporated, the officers, agents, successors and assigns of both these corporations, shall:

1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of, Local 200, Chauffeurs, Teamsters and Helpers "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminating in regard to the hire or tenure of employment, or in any other manner in regard to any term or condition of employment, of any of Respondent's employees in order to discourage union membership or union or other concerted activities.

(b) Threatening its employees with reprisal for filing grievances with the above-named Union or in any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

(c) Refusing to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of its employees in the following unit found to be appropriate for the purposes of collective bargaining:

All truckdrivers employed by United or JMCO excluding all other employees, guards and supervisors within the meaning of the Act.

(d) Dealing directly with its employees concerning their wages, hours or other terms and conditions of employment and unilaterally changing or cancelling employees' wages, hours, holidays, vacations or other terms and conditions of employment without first bargaining over said matters with their exclusive collective bargaining representative.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to Milan Mix, Guy Bourdo, and Percy Williams immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make each of them whole for any loss of earnings he may have suffered as the result of his discriminatory discharge in the manner set forth in "The Remedy" section of the Administrative Law Judge's Decision.

(b) Honor and enforce the terms of the collective bargaining agreement with the above-named Union effective from June 1, 1974 to May 31, 1977.

(c) Bargain collectively, upon request, with the above-named Union with respect to the rates of pay, wages, hours and other terms and conditions

of employment of the employees in the above-mentioned appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Provide to all employees in the collective bargaining unit all unpaid wages, holidays and vacation pay and other benefits established under the aforesaid collective bargaining agreement and in effect since June 1, 1974.

(e) Preserve and, upon request, make available for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in checking compliance with this Order.

(f) Post at its Menomonee Falls, Wisconsin, place of business copies of the attached notice marked "Appendix."/[38] Copies of this notice on forms provided by the Regional Director for the 30th Region shall, after being duly signed by Respondent, be posted by it immediately upon

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/[38]In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 20, in writing, within 20 days of the receipt of this Order what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ John F. Corbley
John F. Corbley
Administrative Law Judge

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

A-49

AFTER A TRIAL AT WHICH ALL SIDES HAD THE CHANCE TO GIVE EVIDENCE IT HAS BEEN DECIDED THAT WE, UNITED CONTRACTORS INCORPORATED AND JMCO TRUCKING INCORPORATED, HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND WE HAVE BEEN ORDERED TO POST THIS NOTICE.

The National Labor Relations Act gives you, as employees, certain rights including the rights:

To self-organization.
To form, join and help unions.
To bargain collectively through a representative of your own choosing.
To act together for collective bargaining or other mutual aid or protection, or
To refrain from any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT threaten to take away your jobs because you file grievances or otherwise join or support a union or engage in any other concerted activities and WE WILL NOT interfere with the exercise of any of your rights set forth above.

WE WILL NOT discharge you or take any other reprisal against you because you file grievances with a union or because you join, support or engage in union or other concerted activities.

WE WILL NOT change or eliminate your wages, hours, holidays, vacations or other terms and conditions of employment established by collective bargaining agreement with CHAUFFEURS, TEAMSTERS AND HELPERS "GENERAL" LOCAL UNION NO. 200, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA without the approval of that union, which is your exclusive bargaining representative.

WE WILL NOT bargain with you concerning your wages, hours, or other terms and conditions of employment outside of the presence of your exclusive collective bargaining representative.

WE WILL continue to recognize that Union as the exclusive bargaining representative of our employees in the following appropriate collective bargaining unit:

All truckdrivers employed by United or JMCO, excluding all other employees, guards and supervisors within the meaning of the Act.

WE WILL, upon request, bargain collectively with that Union with respect to your rates of pay, wages, hours and other terms and conditions of employment and, if an understanding is reached, WE WILL embody such understanding in a signed agreement.

Meanwhile, WE WILL honor and enforce the provisions of our contract with that Union effective from June 1, 1976 to May 31, 1977 and WE WILL provide our employees in the above-mentioned collective bargaining unit all benefits including wages, paid holidays and vacations and other benefits which we have not yet paid pursuant to that agreement.

WE WILL offer to reinstate MILAN MIK, GUY BOURDO and PERCY WILLIAMS to their former or substantially equivalent positions with full seniority and all other rights and privileges, as the Board has found that they were discharged because of their union or other concerted activities.

WE WILL make up all pay lost by MILAN MIK, GUY BOURDO and PERCY WILLIAMS because of their discharges with 6 percent interest.

BEST COPY AVAILABLE

UNITED CONTRACTORS INCORPORATED,
JMCO TRUCKING INCORPORATED, JOINT EMPLOYER

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Commerce Building - 2nd Floor, 744 North 4th Street, Milwaukee, Wisconsin 53203
(Tel. No. (414) 224-3861)

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Milwaukee, Wis.

220 NLRB No. 88

UNITED STATES OF AMERICA

BEFORE THE NATIONAL
LABOR RELATIONS BOARD

UNITED CONTRACTORS INCORPORATED AND
JMCO TRUCKING INCORPORATED,
JOINT EMPLOYERS

and Case 30-CA-2885

CHAUFFEURS, TEAMSTERS AND HELPERS
"GENERAL" LOCAL UNION NO. 200,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA

DECISION AND ORDER

On May 30, 1975, Administrative Law Judge John F. Corbley issued the attached Decision in this proceeding. Thereafter, the Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions/[1] and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, United Contractors Incorporated and JMCO Trucking Incorporated, Milwaukee, Wisconsin, their officers, agents, successors, and assigns,

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/[1]The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his finding.

shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

United States Court of Appeals

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 28

For the Seventh Circuit
Chicago, Illinois 60604

(ARGUED April 8, 1976)
June 23, 19 *76*.

Before
Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*

UNITED CONTRACTORS, INC., and
JMCO TRUCKING, INC., Joint Employers,
Petitioner,

No. 75-1954 vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review and
Cross-Application for
Enforcement of an Order
of the National Labor
Relations Board.

No. 30-CA-2885

ORDER

Review and enforcement are sought of a Board order finding United Contractors Incorporated and JMCO Trucking Incorporated to constitute a single joint employer and as such to have (1) violated Sections 8 (a) (5) and (1) of the Act by dealing directly with its employees rather than with their bargaining agent, by unilaterally changing wages and employment conditions, and by failing to

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*The Honorable William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

apply the terms of a validly executed bargaining agreement, (2) violated Section 8 (a) (1) by threatening employees Milan Mix and Guy Bourdo with reprisals, and (3) violated Sections 8 (a) (3) and (1) by discharging Mix, Bourdo and Percy Williams. Remedies included cease and desist provisions, and reinstatement of Mix, Bourdo and Williams with former seniority privileges and back-pay.

The Board adopted all of the recommendations and affirmed all of the rulings, findings and conclusions of the Administrative Law Judge, as well as adopting his recommended order.

We have reviewed the record and find substantial evidence in the record as a whole to support the Board's findings, conclusions and order.

The petition for review is denied and the cross-application for enforcement is granted.

REVIEW DENIED and
ORDER ENFORCED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 23, 19 *76.*

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*

UNITED CONTRACTORS, INC., and
JMCO TRUCKING, INC., Joint Employers,
Petitioner,

No. 75-1954 vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review and
Cross-Application for
Enforcement of an Order
of the National Labor
Relations Board.

Board No. 30-CA-2885

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing, and further, all members of the panel having agreed to the following statements in order to clarify the basis for denial.

The thrust of the petition is that the petitioning corporations were deprived of an adequate appeal,

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or in effect, a fair disposition of their case, by virtue of the fact that they were not represented by counsel in oral argument or in the preparation of their reply brief.

We note, however, these matters: The original brief was filed by competent counsel who adequately advanced the arguments in support of the petition for review of the National Labor Relations Board order. Many cases come before this court and are decided without a reply brief being filed and reply briefs when filed are often merely a reiteration and reemphasis of what has already been said in the original brief. This court may if it so desires dispense with oral argument although it ordinarily favors it. This court sits on numerous National Labor Board cases and with that background was able to assess the validity of the Board's oral argument as well as having the entire record before it in arriving at its original decision on the petition for review.

More than a month before oral argument the principal owner of the corporations, owning 100% of the stock of one and 90% of the stock of the other, initiated the steps which led to the ultimate withdrawal of the counsel. The owner indicated dissatisfaction with the representation which precipitated the withdrawal which was communicated to the principal owner nearly a month in advance of argument. The principal owner apparently voluntarily determined that no effort should be made to secure other counsel who could have taken steps to present to this court the

need for time to present the petitioners' case to the court.

Having reexamined the matter in the light of the foregoing and continuing to be of the opinion that the Board's findings, conclusions, and order are supported by substantial evidence in the record as a whole, the petition for rehearing is denied.

IT IS ORDERED that the petition for rehearing in the above-entitled matter be, and the same is hereby, DENIED.

No. 76-604

Supreme Court, U. S.
FILED
DEC 21 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED CONTRACTORS INCORPORATED, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
RICHARD A. COHEN,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. A-53 to A-58) are not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A-53) are reported at 220 NLRB No. 88.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1976, and a timely petition for rehearing was denied on July 23, 1976. The petition for a writ of certiorari was filed on October 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that the employer violated Section 8(a)(5) and (1) of the National Labor Relations Act by dealing directly with its employees rather than with their bargaining agent, by unilaterally changing wages and employment conditions, and by failing to apply the terms of a validly executed collective bargaining agreement; and violated Section 8(a)(3) and (1) of the Act by discharging three employees because they engaged in concerted activity protected by the Act.

2. Whether the court of appeals properly held that the employer's lack of counsel in oral argument and in preparation of its reply brief did not prejudice presentation of its case before the court.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended, 61 Stat. 136, 140, 73 Stat. 519, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

The Administrative Law Judge, whose decision the Board adopted (Pet. App. A-51 to A-53), found that petitioners ("JMCO," "United," or "the Company"), are a single employer for purposes of the Act (Pet. App. A-25). He also found that the Company violated Section 8(a)(5) and (1) of the Act by, *inter alia*, dealing directly with its employees with respect to the terms of, and by repudiating, the contract with the Union,[1] executed on August 20, 1974 (Pet. App. A-27, A-39). Finally, he found that the Company violated Section 8(a)(1) of the Act by threatening Milan Mix and Guy Bourdo with reprisals for their union activity, and Section 8(a)(3) and (1) of the Act by discharging Mix, Bourdo, and Percy Williams for concerted activity protected by the Act (Pet. App. A-33, A-36). The facts on which these findings are based are set out in detail in the Administrative Law Judge's decision (Pet. App. A-5 to A-24) and are summarized below.[2]

United (which is engaged in construction) and JMCO (which is engaged in trucking) operate under the common control and management of Jim Mews, who owns 100 percent of JMCO's and 90 percent of United's corporate stock. Mews actively directs both companies' day-to-day affairs and makes all major business and policy decisions for them, including those involving labor relations and personnel matters. Mews directly supervises

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[1]Local 200 of the Teamsters.

[2]The Statement in the petition (Pet. 4-10) reflects the version of events narrated by Jim Mews, the owner of petitioners. The Administrative Law Judge found that the testimony of Mr. Mews was not credible. Pet. App. A-10 n. 5, A-13 n. 9, A-16 n. 11, A-18 n. 13, A-21 n. 16, A-22 nn. 17-18, A-29 n. 23, A-30, A-32, A-36 n. 30, A-38. The Board upheld this credibility finding. Pet. App. A-52 n. 1.

employees of both JMCO and United, and LaVerne Schlei, a supervisory employee of United, also directs and supervises JMCO employees. The two companies have the same corporate officers (Mews and his wife), operate from the same location, and share the same office clerical staff (Pet. App. A-5 to A-6). In 1970 United sold its trucks and transferred its drivers to JMCO,[3] which then began its trucking service. Most of JMCO's revenues have come from payments by United, and employees frequently transfer between the two companies (*ibid.*).

In the fall of 1973, months before JMCO's contract with the Union was to expire,[4] Mews, without notifying the Union, began to discuss with the drivers a plan to pay them a percentage of JMCO's charges to the users of its truck service, in lieu of the contractual wages and benefits (Pet. App. A-9 to A-10; Tr. 83-84, 119-120). Although the drivers expressed displeasure at the proposed change, after the collective agreement expired Mews unilaterally abrogated the employees' hourly wages without notice to the Union, instituted the percentage wage system, ceased paying vacation and holiday benefits, and discontinued payments to the Teamsters' health and welfare and pension funds (Pet. App. A-13; Tr. 84).

In August 1974 Mews signed a new contract with the Union covering the Company's drivers. The contract, effective through May 31, 1977, was executed on behalf

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[3]When Mews transferred the drivers from United to JMCO in 1970, there was no change in their duties, supervision, or rate of pay; the same was true when Mews transferred the drivers from JMCO to United in September 1974 (Pet. App. A-7; Tr. 22, 76-79, 106, 118-119, 167).

[4]In 1971 the Union and JMCO entered into a collective bargaining agreement, which was effective through May 31, 1974.

of United rather than JMCO (Pet. App. A-15 to A-17). Even after executing the contract, however, the Company continued to disregard the contractually prescribed wage rates and fringe benefits (Pet. App. A-18 to A-19).

After the Company unilaterally changed its system of remuneration in 1974, drivers Bourdo and Mix filed a grievance with the Union (Pet. App. A-14 to A-15). Bourdo and Mix filed a second grievance on September 17, 1974, after the Company executed a contract with the Union but refused to abide by its terms (Pet. App. A-19). The Union mailed Mews a letter concerning this grievance, and on September 27 Union representative Duane Kraemer went to Mews's office to discuss the grievance (Pet. App. A-19).

Three days later Mix was summoned to Mews's office. Mews, holding copies of the two grievances and the Union's letter, angrily demanded to know "what [Mix] was trying to pull" and why he had filed the grievance. After Mix explained his reasons, Mews fired Mix, telling him to "turn in his truck keys" until Mix "straightened out" the matter with the Union (Pet. App. A-20 to A-21; Tr. 137). Bourdo was discharged when he reported for work on October 4 (Pet. App. A-21 to A-22). Williams was discharged the same day, ostensibly for lack of work (Pet. App. A-22).

On October 8, 1974, JMCO reinstituted its former trucking operations with newly hired non-union drivers (Pet. App. A-23). Mews later responded to the Union's grievance letters by stating that JMCO had terminated its contract with the Union (Pet. App. A-30).

The Administrative Law Judge found that JMCO and United are a single employer for the purposes of the Act, and that the Company therefore could not evade its bargaining obligation to the Union by signing the contract on

behalf of United and then performing its trucking operations through JMCO without applying the contract (Pet. App. A-37 to A-38). He also rejected, as not supported by the credited evidence, the Company's contentions that it did not violate its bargaining obligation because (1) on several occasions it expressed its willingness to meet with the Union and negotiate a contract for JMCO; and (2) the Union refused to bargain by insisting that the Company sign the association contract or face a strike (Pet. App. A-38 to A-39). Finally, he rejected the Company's assertions that Mix and Bourdo were not "discharged" but that their positions had ended when United ceased trucking operations, and that they were offered, but refused, employment with JMCO (Pet. App. A-30, A-32 to A-33), and that Williams was discharged because he was an unsatisfactory employee and because of lack of work (Pet. App. A-34 to A-36).

The court of appeals enforced the Board's order. The Company petitioned for rehearing, maintaining that it had been deprived of adequate judicial review because Mews, who is not an attorney, had been permitted to argue the case orally and to file a reply brief.[5] The court denied the petition, observing (Pet. App. A-57):

> The original brief was filed by competent counsel who adequately advanced the arguments in support of the petition for review of the National Labor Relations Board order. Many cases come before this court and are decided without a reply brief being filed and reply briefs when filed are often merely a reiteration and reemphasis of what has already been said in the original brief. This Court may if it so desires dispense with oral argument although it ordinarily favors it.

[5]Following issuance of the Board's order, the Company, by counsel who had represented it throughout the proceedings before the Board, filed a petition for review in the court of appeals. The Board filed a cross-application for enforcement. The Company's counsel then prepared and filed a brief in support of the petition, and the Board filed its answering brief. Mews's dissatisfaction with his attorney led him to file his own reply brief. The Company's attorney then withdrew from the case, and Mews was permitted to argue his own case.

The court added that Mews had had ample time to secure new counsel prior to oral argument after counsel who filed the opening brief withdrew (*id.* at A-57 to A-58.

ARGUMENT

1. The basic issue presented by the petition is whether substantial evidence supports the Board's findings that United and JMCO were a single employer for purposes of the Act and that the Company violated its bargaining obligations under the Act and unlawfully discharged three employees. These purely evidentiary issues do not warrant review by this Court. *South Prairie Construction Co.* v. *Local 627, Operating Engineers,* No. 75-1097, decided May 24, 1976; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. In any event, the facts we have recounted amply support the Board's decision.

2. The question whether corporate officers who are not lawyers may represent their corporations in the court of appeals is not presented here. The court below did not decide that question but held simply that, on the particular facts here, "the petitioning corporations were [not] deprived of an adequate appeal, or in effect, a fair disposition of their case, by virtue of the fact that they were not represented by counsel in oral argument or in the preparation of their reply brief" (Pet. App. A-56 to A-57). The petition does not challenge the court's determination that the Company was not prejudiced; in any event, it raises no issue warranting review by this

Court. The Sixth Amendment's guarantee of effective assistance of counsel does not apply in civil suits. If, as petitioners maintain, Mews acted improperly or not in the best interests of the corporations, that is a matter to be settled between petitioners and Mews; it is not a reason to hold another hearing in the court of appeals.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
RICHARD A. COHEN,
Attorneys,
National Labor Relations Board.

DECEMBER 1976.

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[6]The cases cited by petitioners (Pet. 13-14) as standing for the proposition that a corporate officer who is not an attorney has no *right* to appear in court on behalf of the corporation do not support the proposition that a court of appeals, which has plenary authority over the practice of law before it, cannot allow such an appearance. Moreover, because this is not a criminal case, it is not similar to *Stockheimer* v. *United States*, No. 76-5152, certiorari denied, November 15, 1976, to which petitioners refer (Pet. 12). Cf. *United States* v. *Suchy*, 540 F. 2d 254 (C.A. 6).